LIBRARY
SUPREME COURT, U. S.

FILED
APR 19 1967
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1297

HARRY T. BOWERS,
Petitioner,
vs.
KAISER STEEL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the
State of Alaska

EDGAR PAUL BOYKO,
811 West Seventh Street,
Los Angeles, California 90017,
Attorney for Petitioner.

JOHN M. SAVAGE,
BOYKO AND SIMMONS,
LEONARD W. SCHROETER,
MICHAEL W. ROTBERG,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Statement of jurisdiction	2
Federal statutes	2
Question presented	2
Statement of the case	3
Argument	7
Conclusion	12

Table of Authorities Cited

Cases	Pages
Butler v. Whiteman, 356 U.S. 271 (1958)	9, 11
Gahagan Construction Corp. v. Armao, 165 F.2d 301 (1st Cir. 1948)	8, 9
Gianfala v. Texas Co. (5th Cir.) 222 F.2d 387, rev'd 350 U.S. 879 (1955)	7, 8
Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1958)	7, 10, 11
Kyles v. James W. Elwell & Co., 296 F.2d 703 (7th Cir. 1961), cert. den. 369 U.S. 852 (1962)	11, 12
Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959)	9, 10, 11
Rotolo v. Halliburton Co., 317 F.2d 9 (5th Cir.), cert. den. 375 U.S. 852 (1963)	12
Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957)	9, 11
South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940)	8, 11

Pages

Summerlin v. Massman Const. Co., 199 F.2d 715 (4th Cir. 1952) 8, 9

Swanson v. Marra Bros., 328 U.S. 1 (1946) 11

Thibodeaux v. McDermott & Co., 276 F.2d 42 (5th Cir. 1960) 11

Wilkes v. Miss. River Sand & Gravel Co., 202 F.2d 383 (6th Cir. 1953) 8, 9

Statutes

Jones Act, 46 U.S.C. Section 688 (1920) 2

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901-950 (1927) 2

28 U.S.C. Section 1257(3) 2

33 U.S.C. Section 903(a)(1) 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No.

HARRY T. BOWERS,
Petitioner,
vs.
KAISER STEEL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the
State of Alaska

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Alaska, dated January 20, 1967, in Case No. 703, as reported at ..... Alaska ....., 422 P.2d 848; petitioner prays for instructions directed to the Alaska Supreme Court to reverse the summary judgment of the Superior Court of the State of Alaska, Third Judicial District, in favor of Respondent Kaiser Steel Corporation.

STATEMENT OF JURISDICTION

The judgment of the Alaska Supreme Court was entered on January 20, 1967; the court's opinion is reprinted in full in Appendix A. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) on the ground that the state court's decision raises a substantial federal question under the Jones Act, 46 U.S.C. §688 (1920).

FEDERAL STATUTES

This case involves the Jones Act as modified by the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§901-950 (1927), limiting Jones Act causes of action against an employer to a seaman "who shall suffer personal injury in the course of his employment" and who is "a master or member of a crew of any vessel". 46 U.S.C. §688, 33 U.S.C. §903(a)(1).

QUESTION PRESENTED

The question here presented is whether, on the record before the Alaska Supreme Court, there was any evidentiary basis for finding that petitioner was a member of a crew of any vessel. Put in negative terms, the question is whether the record was devoid of facts upon which the jury could properly find that petitioner was a "Jones Act seaman", *i.e.*, a master or member of a crew of any vessel. In its opinion, the state supreme court concluded that there were no facts which would authorize such finding. Petitioner's position is that there are sufficient facts to entitle him to have the issue tried by a jury, and that, in reaching

the opposite conclusion, the Alaska Supreme Court was in clear error.

STATEMENT OF THE CASE

The factual record before the trial court and state supreme court consisted of the deposition of petitioner and the affidavit of Roderick A. Chisholm, a project manager of Respondent Kaiser Steel Corporation, reprinted in full in Appendix B.

Quoting from the opinion of the Alaska Supreme Court with citations omitted, the following paragraphs represent the court's complete discussion of the factual record (422 P.2d at 850-851):

> Appellant was hired by Kaiser in August of 1964 in Anchorage, Alaska, through Local 751 of the Ironworkers' Union. Appellant immediately went to work for Kaiser at a Middleground Shoal platform located in Cook Inlet. This oil drilling platform had been secured to the floor of Cook Inlet prior to appellant's commencement of his employment.
>
> At the time of the accident on November 4, 1964, appellant's position was that of foreman over the unloading and loading of materials from barges to the drilling platform. Appellant did not perform any work on the barges other than that of loading and unloading. Appellant had four or five ironworkers (employees of Kaiser) under his supervision and was himself subject to the orders of both Kaiser's general foreman and superintendent.
>
> On the day of the accident, appellant was supervising the unloading of Foss Barge No. 185 which was owned by the Foss Launch & Tug

> Company. This barge [quoting from Chisholm's affidavit] was "utilized for the transportation of construction materials to the Drilling Platform, which Kaiser was under contract with Shell Oil Company to construct. The Foss Barge No. 185 was not self-propelled and had no crew. It was towed to and from the location of the Drilling Platform at the job site by a tug boat owned and operated by Foss Launch & Tug Company, pursuant to a towing contract between Foss Launch & Tug Company and Kaiser Steel Corporation by which Foss furnished the services of a fully-manned tug, as required by Kaiser, for an agreed consideration. All navigation of the barge was accomplished by the Foss tug and its crew. . . ."
>
> The only time that appellant came under the supervision of the officers of the tug was when "the seas got too rough and they could no longer hold the barge in position." At such time the officers of the tug would tell appellant to "knock off."
>
> Appellant's deposition also disclosed that Foss kept four or five of these barges anchored off shore "with miscellaneous pieces of structure on board. They would bring them in with the right components that we wanted. We'd load off the barge, erect the tower off them." Appellant could not estimate how many times he had been on board Foss Barge No. 185, or whether he had ever been on the barge prior to the accident.

However, in addition to this summary of the facts, the court omitted from its opinion the following relevant facts: Petitioner performed his loading and unloading activities in connection with construction of the drilling platform. After construction had been in

progress, petitioner and the other workers slept and took meals on the platform. Bunkhouse trailers were provided on the platform by Kaiser. At the time he was injured, petitioner was living ashore in a rented house and was transported to and from the platform by a helicopter. He and the other workers were on the job seven days a week, 14 to 16 hours per day. Petitioner would sometimes remain and work on the platform for two or three days at a time. On the day he was injured, petitioner had been working on the barge for three and one-half to four hours (Deposition of Petitioner 8, 13).

The details of petitioner's duties were as follows: In addition to him, two ironworkers and a civil engineer employed by Kaiser were on board the barge. Petitioner was in charge of these ironworkers, together with two or three other Kaiser workers on board the platform. The only Foss employees on board the barge were deckhands from the tugboat who checked mooring lines. Two tugs were positioned alongside the barge to hold it stationary. A signal man remained on the deck of the platform and relayed petitioner's signals to the crane operator. The latter was operating the crane, which, at the time of the accident, was carrying a load of steel channels, angles and pipes measuring approximately 30 feet in length by 20 feet in height. The purpose was to remove this material to a different location, since it had been stockpiled aboard the barge in incorrect layers.

Petitioner was pushing the load with his hand to guide it into the new location, where two other ironworkers were waiting to unload the steel parts. He

was standing on top of two girders in a position to fit the equipment through a slot, when the crane operator dropped the load, including a large frame which fell in his direction. He jumped off the girders and was injured (Petitioner's Deposition 10-11, 13-17).

The Alaska Supreme Court ruled that

> "[o]ur review of the record has led us to the conclusion that there is no reasonable evidentiary basis which would support a jury's finding that petitioner was a seaman and *a member of the crew of Foss Barge No. 185 at the time he was injured*" (Emphasis added, 422 P.2d at 855).

The italicized language demonstrates that the court did *not* decide the real issue, *viz.*, whether petitioner was a member of a crew of *any* vessel.

This delimitation of the issue unduly restricted the court's review of the factual record, and is itself an improper invasion of petitioner's right to a jury trial. The court's appraisal of the scope of the issue before it expressly appears in footnote 14 of the opinion, where it is stated that "[a]ppellant does not contend that the drilling platform was a vessel"[1] (422 P.2d at

---

[1]Perhaps the court's statement is based on its incorrect inference that petitioner was so limiting himself because of paragraph II of the complaint, which reads: "[P]laintiff was a seaman at the time of his injury because he was on said barge which was held against the tower by two tugboats and he was doing the work of a seaman in hooking up the steel girders for the crane to pick up." It was not the intent of this allegation, nor is it a fair inference therefrom, that petitioner was limiting his claim to the theory that the barge was the only vessel on which he was a crew member or master.

850). Petitioner's contention is quite different from this characterization; his position is and has been that the issue, erroneously decided by the state supreme court, is whether there are sufficient facts from which a jury may find that he was a master or crew member of any vessel.

ARGUMENT

The record before the Alaska Supreme Court did not permit the conclusion that, as a matter of law, petitioner was not entitled to have a jury decide whether he was a master or member of a crew of any vessel. It is true, as the court observed, that there are a line of cases in which the jury was prevented from trying the issue, either by a motion for summary judgment or a directed verdict following presentation of the plaintiff's evidence. As shown below, the instant case cannot properly be placed in this category.

There is another series of cases, particularly *Grimes v. Raymond Concrete Pile Co., infra,* which are clear precedents for holding that the record provides an evidentiary basis for finding that petitioner was a Jones Act seaman at the time of his injury.

The first of these is *Gianfala v. Texas Co.,* 350 U.S. 879 (1955), a *per curiam* opinion reversing the judgment of the Fifth Circuit granting a directed verdict in favor of the defendant. The opinion contained instructions to reinstate the district court judgment based on the jury's finding that the decedent was a member of the crew of any vessel. The circuit court

had held that the evidence offered at trial led to one conclusion, inescapable as a matter of law, *viz.*, that decedent was doing "work which is done strictly and only by oil field workers, handling the tubing to be used in completing the well and he was certainly not a [Jones Act seaman]" (222 F.2d at 387).

The decedent had been killed while working aboard a drilling barge. His duties were to pump water from an adjacent boiler barge into the drilling barge and thereby make it stationary, and to pump the water out to enable movement of the barge from location to location—which occurred only about once every year. Similarly to petitioner here, the decedent was on duty six days a week, remaining on board the barge for approximately 12 hours each day; he was taken to and from the barge by speedboats supplied by the Texas Company.

This Court, in reversing the judgment in *Gianfala,* relied on four decisions: *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251 (1940); *Summerlin v. Massman Const. Co.,* 199 F.2d 715 (4th Cir. 1952); *Wilkes v. Miss. River Sand & Gravel Co.,* 202 F.2d 383 (6th Cir. 1953); and *Gahagan Construction Corp. v. Armao,* 165 F.2d 301 (1st Cir. 1948). These cases established the following principles: The words "crew" and "vessel" do not have an unvarying legal significance. Thus, the earlier view that only those persons who perform traditional navigational functions on a sea-going vessel are Jones Act seamen has been replaced by the more flexible rule that allows the jury to decide the issue whenever there is any factual basis to support such a finding.

In *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957), this Court considered the question of whether a maintenance man on a dredge, which was almost always anchored to the shore, was a Jones Act seaman. The fact that the plaintiff lived ashore and was only aboard the dredge when anchored was held not controlling. Since the plaintiff's duties "would have a significant navigational function when the dredge was put in transit", there was sufficient evidence to support a finding that the plaintiff was a member of the dredge's crew. See also *Butler v. Whiteman*, 356 U.S. 271 (1958).

But the navigational function test proved manifestly unsatisfactory in cases where the vessel in question is, *e.g.*, an immobile oil drilling platform. To provide Jones Act coverage for seamen on vessels of this kind, the doctrine of "special structures" was introduced in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). At the same time, the requirement of navigational duties was significantly relaxed and alternatives to navigational function as the hallmark of a Jones Act seaman were established. The opinion in *Robison* pointed out that the vessels in *Summerlin* (derrick), *Wilkes* (gravel barge) and *Gahagan* (dredge) were special structures even though the characterization was not set forth in those opinions. In *Robison* the vessel was a non-motive drilling platform, similar to the platform in the instant case, firmly affixed to the bottom of the sea at the time of injury.

The *Robison* test for Jones Act seamen is twofold: whether, as with petitioner, the injured workman is

(1) "assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) *or* performed a substantial part of his work on the vessel"; and (2) *any* of the following: "if the capacity in which he was employed *or* the duties in which he was employed *or* the duties which he performed contributed to the function of the vessel *or* to the accomplishment of his mission, *or* to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips" (Emphasis added, 266 F.2d at 779).

The only possible factual distinction between *Robison* and the instant action is that the drilling platform in the former case was intended to and actually was moved from time to time to different locations, while the Middleground Shoal platform conceivably may never be moved.[2] But this factor cannot be deemed controlling, since both the plaintiff in *Robison* and petitioner were exposed to similar hazards and performed duties contributing to the function of the vessel.

Respondent nevertheless cannot depend on even this minor difference, for in *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958), followed in *Robison*, the special structure in question was a permanently

---

[2]Yet, Chisholm's affidavit in support of the motion for summary judgment to the effect that the platform could *never* float is belied by his statement that the platform was towed from California to Alaska (See Appendix B). In any event, the platform belonged to Shell Oil, which did not employ Chisholm, and his opinion that Shell would never move the platform cannot be regarded as conclusive.

fixed Texas tower or drilling platform not intended to float or to be moved. In *Grimes,* this Court, on almost identical facts as herein, held that there was a factual issue as to whether the plaintiff was a Jones Act seaman. That decision is direct authority for granting the relief sought by petitioner.

The workman in *Grimes,* a pile driver, was injured while being transferred in a "Navy life ring" from a tugboat to the tower. The platform, as here, was built but not owned by the respondent, and it too contained living quarters and was to be used in oil drilling operations. And, like petitioner here, the plaintiff's pile-driving duties were not performed on the tugboat, but rather on a non-motive barge used for transporting construction materials to the tower.

The factual record here is even more clear than in *Grimes* in establishing an evidentiary basis sufficient to reverse the summary judgment. The plaintiff there had far less connection than petitioner with both the tugboat and the barge, riding in the tugboat merely as a passenger and working on the barge only once prior to being injured. In short, based on *Grimes* alone, the issue of whether petitioner is a Jones Act seaman is *a fortiori* a fact question which the jury, not the court, should resolve.

The line of cases following *Swanson v. Marra Bros.,* 328 U.S. 1 (1946), are clearly distinguishable on the facts from the record here as well as from the facts in *Grimes, Robison, Gianfala, Senko* and *Butler.*

For example, such cases as *Thibodeaux v. McDermott & Co.,* 276 F.2d 42 (5th Cir., 1960); *Kyles v.*

James W. Elwell & Co., 296 F.2d 703 (7th Cir. 1961); *cert. den.* 369 U.S. 852 (1962); and *Rotolo v. Halliburton Co.*, 317 F.2d 9 (5th Cir.), *cert. den.* 375 U.S. 852 (1963), are precedents only where the facts clearly demonstrate a *transitory* connection between the workman and the vessel. Petitioner's connection with the barge and the drilling platform, and perhaps the tugboat as well, was hardly transitory. These cases, relied on by the Alaska Supreme Court, are thus not authority for deciding as a matter of law whether petitioner was a master or member of a crew of any vessel.

CONCLUSION

For the above reasons, the writ should be granted and the Alaska Supreme Court should be directed to reverse the summary judgment against petitioner.

Dated: April 17, 1967.

Respectfully submitted,
EDGAR PAUL BOYKO,
Attorney for Petitioner.

JOHN M. SAVAGE,
BOYKO AND SIMMONS,
LEONARD W. SCHROETER,
MICHAEL W. ROTBERG,
Of Counsel.

(Appendices Follow)

Appendix A

The Supreme Court of the State of Alaska

File No. 703
[No. 384—January 20, 1967]

HARRY T. BOWERS, *Appellant,*

vs.

KAISER STEEL CORPORATION, *Appellee.*

OPINION

Before: Nesbett, Chief Justice, Dimond and Rabinowitz, Justices.

Rabinowitz, Justice.

The superior court granted summary judgment in appellee's favor by holding that as a matter of law appellant was neither a seaman nor a member of the crew of any vessel within the purview of the Jones Act.[1] We affirm.

Appellant instituted an action in the superior court against appellee Kaiser Steel Corporation under the

[1] 38 Stat. 1185 (1915), 46 USC § 688 (1964). This act provides in part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . .

Jones Act. Appellant alleged that while employed by Kaiser he was

> working as a seaman . . . by off-loading steel girders from a barge owned by Foss Launch & Tug Company, Incorporated, on navigable waters of the United States in Cook Inlet, Alaska. That . . . [he] was a seaman at the time of his injury because he was on said barge which was held against the tower by two tugboats and he was doing the work of a seaman in hooking up the steel girders for the crane to pick up.

Appellant asserted that he was injured due to the fault of an employee of Kaiser whose negligent operation of a crane knocked him into the hold of the barge. Pertinent to this appeal is Kaiser's second affirmative defense where it asserted that appellant's exclusive remedy was under the Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1424-46 (1927), 33 USC §§ 901-50 (1964).[2]

After issue was joined Kaiser moved for summary judgment on the ground that as a matter of law appellant "was not a seaman" or "member of the crew of any vessel" entitled to sue under the Jones Act and was therefore "barred from maintaining this suit by the provisions of the Longshoremen's & Harbor

---

[2]In this second affirmative defense appellee specifically alleged that:

> [A]t the time of his injuries plaintiff was employed as a structural iron worker in connection with the construction of an oil drilling platform and tower permanently secured to the floor of Cook Inlet, Alaska; and was covered by the provisions of the Longshoremen's and Harbor Workers' Compensation Act . . . .

Workers' Compensation Act."[3] Appellee Kaiser based its motion for summary judgment on appellant's deposition and the affidavit of Roderick A. Chisholm, appellee's project manager.[4]

In granting summary judgment in appellee's favor, the trial court dismissed appellant's "complaint and the within action . . . with prejudice." In his brief appellant presents a single specification of error, namely, that the lower court erred in granting summary judgment since the question of "Who is a Seaman" under the Jones Act is a factual question requiring resolution by the trier of fact.

In 1915, Congress enacted the Jones Act which gave seamen the right to elect to sue "for damages at law" for injuries suffered in the course of their employment.[5] In *International Stevedoring Co. v. Haverty*[6] the Supreme Court of the United States held

---

[3]44 Stat. 1426 (1927), 33 USC § 903(a)(1) (1964), of the Longshoremen's & Harbor Workers' Compensation Act provides:

> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States . . . . No compensation shall be payable in respect of the disability or death of—
>
> (1) A master or member of a crew of any vessel . . . .

Section 905 of the act provides:

> The liability of an employer prescribed in . . . this title shall be exclusive and in place of all other liability of such employer to the employee . . . except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death.

[4]Appellant's only opposition to the motion was a brief filed in "Opposition To Motion For Summary Judgment."

[5]38 Stat. 1185 (1915), 46 USC § 688 (1964).

[6]272 U.S. 50, 71 L. Ed. 157 (1926).

that longshoremen engaged in loading and unloading a vessel at a dock in navigable waters were seamen under the provisions of the Jones Act. Subsequent to that decision the Longshoremen's & Harbor Workers' Compensation Act was passed by Congress.[7] This act covers employees "employed in maritime employment, in whole or in part, upon the navigable waters of the United States,"[8] excluding from its coverage "a master or member of a crew of any vessel."[9]

After stating that the Longshoremen's & Harbor Workers' Compensation Act remedy is exclusive, Chief Justice Stone, in *South Chicago Coal & Dock Co. v. Bassett,*[10] wrote:

> They [seamen] preferred however to remain outside the compensation provisions and thus to retain the advantages of their election under the Jones Act, and the bill was changed accordingly so as to exempt 'seamen.' Then, in its final passage, the words 'a master or member of a crew' were substituted for 'seamen.' We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable waters, in the work of loading or unloading, were 'seamen.'
>
> . . . .
>
> This Act, as we have seen, was to provide compensation for a class of employees at work on a

---

[7] 44 Stat. 1424-46 (1927), 33 USC §§ 901-50 (1964).

[8] 44 Stat. 1425 (1927), 33 USC § 902(4) (1964).

[9] 44 Stat. 1426 (1927), 33 USC § 903(a)(1) (1964); see also 44 Stat. 1425 (1927), 33 USC § 902(3) (1964).

[10] 309 U.S. 251, 257, 260, 84 L. Ed. 732, 736-37 (1940). (Footnote omitted.)

> vessel in navigable waters who, although they might be classed as seamen (International Stevedoring Co. v. Haverty . . .), were still regarded as distinct from members of a 'crew.' They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation.

With this brief historical sketch in mind we turn to the merits of this appeal.[11]

Appellant was hired by Kaiser in August of 1964 in Anchorage, Alaska, through Local 751 of the Ironworkers' Union.[12] Appellant immediately went to work for Kaiser at a Middleground Shoal platform located in Cook Inlet.[13] This oil drilling platform had been secured to the floor of Cook Inlet prior to appellant's commencement of his employment.[14]

At the time of the accident on November 4, 1964, appellant's position was that of foreman over the un-

---

[11]State courts have jurisdiction over Jones Act actions. Garrett v. Moore-McCormack Co., 317 U.S. 239, 87 L. Ed. 239 (1942).

[12]During the previous twenty years appellant belonged to no other union and had never been to sea as a seaman.

[13]The record shows that Kaiser was building this drilling platform for the Shell Oil Company. The record further shows that at the time of the accident appellant was living in a rented house on shore and that prior to that date he had lived part of the time in quarters on the platform and part of the time ashore.

[14]Appellant does not contend that the drilling platform was a vessel. In his affidavit Roderick Chisholm asserted that the drilling platform was not and never had been capable of floating, and that on approximately August 16, 1964, its legs were "upended and secured permanently to the floor of Cook Inlet, and compartments thereof were flooded."

loading and loading of materials from barges to the drilling platform. Appellant did not perform any work on the barges other than that of loading and unloading. Appellant had four or five ironworkers (employees of Kaiser) under his supervision and was himself subject to the orders of both Kaiser's general foreman and superintendent.

On the day of the accident, appellant was supervising the unloading of Foss Barge No. 185 which was owned by the Foss Launch & Tug Company. This barge was

> utilized for the transportation of construction materials to the Drilling Platform, which Kaiser was under contract with Shell Oil Company to construct. The Foss Barge No. 185 was not self-propelled and had no crew. It was towed to and from the location of the Drilling Platform at the job site by a tug boat owned and operated by Foss Launch & Tug Company, pursuant to a towing contract between Foss Launch & Tug Company and Kaiser Steel Corporation by which Foss furnished the services of a fully-manned tug, as required by Kaiser, for an agreed consideration. All navigation of the barge was accomplished by the Foss tug and its crew . . . .[15]

The only time that appellant came under the supervision of the officers of the tug was when "the seas got too rough and they could no longer hold the barge in position." At such time the officers of the tug would tell appellant to "knock off."

---

[15]From the uncontroverted affidavit of Roderick Chisholm, project manager of appellee.

Appellant's deposition also disclosed that Foss kept four or five of these barges anchored off shore "with miscellaneous pieces of structure on board. They would bring them in with the right components that we wanted. We'd load off the barge, erect the tower off them." Appellant could not estimate how many times he had been on board Foss Barge No. 185, or whether he had ever been on the barge prior to the accident.[16]

Against this undisputed factual background appellant contends here, as he did below, that a jury question was presented on the issue of whether he was a seaman under the Jones Act. In support of his position, appellant relies primarily on four decisions of the Supreme Court of the United States, namely, *Butler v. Whiteman;*[17] *Grimes v. Raymond Concrete Pile Co.;*[18] *Senko v. LaCrosse Dredging Corp.;*[19] *Gianfala v. Texas Co:;*[20] and the Fifth Circuit's decision in *Offshore Co. v. Robison.*[21] Although these decisions reflect a most expansive construction of the terms "seamen" and "member of a crew of any vessel," we do not interpret them as requiring that the question of appellant's status be submitted to a jury under the facts of this case.[22]

---

[16]Appellant also testified that he was paid workmen's compensation benefits during the period of time he was absent from work due to the injuries in question.

[17]356 U.S. 271, 2 L.Ed.2d 754 (1958).

[18]356 U.S. 252, 2 L.Ed.2d 737 (1958).

[19]352 U.S. 370, 1 L.Ed.2d 404 (1957).

[20]350 U.S. 879, 100 L.Ed. 775 (1955).

[21]266 F.2d 769 (5th Cir. 1959).

[22]At the time he filed his complaint appellant filed a demand for a jury trial.

In reviewing the *Gianfala* case, Judge Wisdom, in *Offshore Co. v. Robison*,[23] wrote:

> Gianfala . . . is the key case in the conversion of offshore oil field workers into seamen. Gianfala . . . did regular oil field work aboard a submersible drilling barge. The barge was resting on the bottom of a bay at the time of the accident. . . . The defendant contended that the drilling barge was not a vessel in navigation and that the decedent was an oil field employee whose duties were not primarily in aid of navigation. The trial court held that the decedent's status was a question for the jury. This Court reversed . . . holding that the facts were undisputed and that the applicability of the Jones Act is a question of law to be determined by the court. As a matter of law, the decedent was not aboard ship, primarily to aid in navigation; 'on the contrary he was aboard ship not as a member of the ship's crew, but as a member of the drilling crew' doing work done only by oil field workers. The Supreme Court, in a short per curiam opinion, granted a writ of certiorari, reversed this Court, and remanded the case to the district court with directions to reinstate its judgment.

Senko concerned a handyman employed on a dredge who was injured by the explosion of a coal stove located in an onshore shed (the explosion occurred while the handyman was placing a signal lantern in the shed). After alluding to its decision in *Swanson v. Marra Bros.*,[24] in which it held that the Longshore-

---

[23] 266 F.2d at 774.

[24] 328 U.S. 1, 90 L.Ed. 1045 (1946).

men's & Harbor Workers' Compensation Act restricts the scope of the Jones Act to "members of a crew of a vessel," the Supreme Court said:

> We believe, however, that there is sufficient evidence in the record for the jury to decide that petitioner was permanently attached to and employed by the dredge as a member of its crew.
>
> Petitioner's witnesses testified that he was known as a 'deckhand' among rivermen. They said that he was hired to clean and take care of the deck, splice rope, stow supplies, and, in general, to keep the dredge 'in shape.' This testimony indicated that substantially all of petitioner's duties were performed on or for the dredge. A normal inference is that petitioner was responsible for its seaworthiness. If the dredge leaked, for example, the jury could suppose that his job would be to repair the leak.
>
> . . . .
>
> Because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was put in transit, we hold there was sufficient evidence in the record to support the finding that petitioner was a member of the dredge's crew.[25]

The *Grimes* case involved a Jones Act suit by a pile driver who was injured while being transferred at sea in a Navy life ring from a tug to a Texas

---

[25]352 U.S. at 372-74, 1 L.Ed.2d at 407-08. Note Justices Harlan, Frankfurter, and Burton dissented.

tower.[26] Petitioner had assisted in the completion of the tower and

> when the tower was towed to sea, petitioner with about 25 other workmen lived on the tower and kept it in condition by operating air compressors, generators, and pumps to expedite installation at the permanent site, as well as by performing certain functions to keep it in safe tow. After the tower was anchored at its permanent site and while the temporary pilings were being driven down, petitioner performed only pile-driving.[27]

The Supreme Court held that petitioner's evidence "presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of a crew of any vessel."[28]

In *Butler,*[29] the terms "seaman" and "a member of a crew" again received a broad reading by the Supreme Court of the United States. In holding that "the petitioner's evidence presented an evidentiary basis for jury findings as to . . . whether or not the petitioner's decedent was a seaman and member of the crew of the tug within the meaning of the Jones Act," the Court cited the *Senko, Gianfala,* and *Grimes* cases. Factually, decedent had been employed

---

[26]The Texas tower was described, in the *Grimes* case, as "a triangular metal platform superimposed some 60 feet above the surface of the sea on supports permanently affixed to the floor of the ocean by three caissons, and utilized to operate a radar warning station." 356 U.S. at 254, 2 L.Ed.2d at 739.

[27]The quote is from Justice Harlan's dissent in the *Grimes* case. 356 U.S. at 254-55, 2 L.Ed.2d at 740. Justice Whittaker joined in Justice Harlan's dissent.

[28]*Id.* at 253, 2 L.Ed.2d at 739.

[29]356 U.S. 271, 2 L.Ed.2d 754 (1958).

as a laborer doing odd jobs around respondent's wharf and at the time of the accident had been engaged in cleaning the boiler of respondent's tug.[30] Although previously withdrawn from navigation at the time of the accident, the "tug was undergoing rehabilitation preparatory to a Coast Guard inspection, presumably in anticipation of a return to service."[31] Decedent was last seen alive running across the barge to the tug.

After reviewing the foregoing decisions of the United States Supreme Court, the Fifth Circuit in the *Offshore* case concluded:

> Attempts to fix unvarying meanings have [sic] a firm legal significance to such terms as 'seaman', 'vessel', 'member of a crew' must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case.[32]

---

[30]Respondent's tug was lashed to a barge which in turn was moored to respondent's wharf "all situated on the Mississippi River."

[31]The facts are taken from Justice Harlan's dissent in Butler v. Whiteman, 356 U.S. 271, 272-73, 2 L.Ed.2d 754, 755 (1958).

[32]Offshore Co. v. Robinson, 266 F.2d 769, 779-80 (5th Cir. 1959). (Footnote omitted.) The court went on to say:

> Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts. *Id.* at 780.

It is also of importance to note that the court in *Offshore* adopted the following test for determining whether an evidentiary basis for a Jones Act case to go to the jury exists:

> . . . (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose

The gist of appellee's position in this appeal is that appellant argues for too expansive an interpretation, and application, of the *Butler, Grimes, Senko,* and *Gianfala* decisions. Succinctly stated; appellee's contention is that "an employee whose sole function aboard a vessel is to load or unload cargo from it is not a member of the crew as a matter of law." As we have indicated previously, we are in accord with appellee's position.

In *South Chicago Coal & Dock Co. v. Bassett,*[33] the Supreme Court defined member of a crew as "employees on the vessel who are naturally and primarily on board to aid in her navigation." Some seventeen years later in the *Senko*[34] case, the test was apparently changed to one of whether the employee "would have a significant navigational function."

---

structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips. *Id.* at 779.

[33] 309 U.S. 251, 260, 84 L.Ed. 732, 737 (1940).

[34] 352 U.S. 370, 374, 1 L.Ed.2d 404, 408 (1957). See also Bodden v. Coordinated Caribbean Transp. Inc., 249 F.Supp. 561, 563 (S.D. Fla. 1965), where the court said:

> The essential and decisive elements of the definition of a 'member of a crew' are that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation. McKie v. Diamond Marine Co. (5th Cir. 1953), 204 F.2d 132; Zientek v. Reading Company (3rd Cir. 1955), 220 F.2d 183; Wilkes v. Mississippi River Sand & Gravel Co. (6th Cir. 1953), 202 F.2d 383; Gahagan Const. Corporation v. Armao (1st Cir. 1948), 165 F.2d 301.

In *Swanson v. Marra Bros.*,[35] the Supreme Court of the United States held that, by virtue of the provisions of the Longshoremen's & Harbor Workers' Compensation Act, a longshoreman was precluded from suing his employer under the Jones Act for injuries sustained while on a pier and engaged in loading cargo onto a vessel lying alongside. In its opinion the Court said:

> We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the Haverty Case only such rights to compensation as are given by the Longshoremen's Act.

The *Swanson* decision has been followed in *Kyles v. James W. Elwell & Co.*;[36] *Aycock v. Lykes Bros. S.S. Co.*;[37] *Hertel v. American Export Lines, Inc.*;[38] and *Garland v. Alaska S.S. Co.*[39] In the *Aycock* case, the court said:

> Longshoremen, as a matter of law, have not been regarded as crewmen of a vessel belonging to their employer and, therefore, are not qualified to

---

[35]328 U.S. 1, 7, 90 L.Ed. 1045, 1049 (1946).

[36]296 F.2d 703, 704 (7th Cir. 1961), *cert. denied*, 369 U.S. 852, 8 L.Ed.2d 10 (1962).

[37]236 F.Supp. 360, 361 (S.D. Tex. 1964).

[38]225 F.Supp. 703, 705 (S.D. N.Y. 1964).

[39]217 F.Supp. 757, 759 (D. Alaska 1963).

maintain a civil action against their employer-vessel owner under the Jones Act.[40]

We believe that the *Swanson* line of cases are controlling and therefore affirm the lower court's summary judgment. The record demonstrates that appellant's duties, and the actual work he was performing at the time of his injury, were those of a longshoreman. He was not aboard the Foss Barge No. 185 "primarily . . . to aid in her navigation" nor did he perform, nor was he expected to perform, "a significant navigation function" in regard to this barge. Appellant's only nexus with the barge in question was to unload and load it after it had been placed in position alongside of the drilling platform.

We do not read the *Butler, Grimes, Senko,* and *Gianfala* line of decisions as precluding grants of summary judgments or directed verdicts once Jones Act status has been asserted. In this regard the Fifth

---

[40]Judge Walter H. Hodge, in his opinion in Garland v. Alaska S.S. Co., 217 F.Supp. 757, 759 (D. Alaska 1963), after quoting from the *Swanson* opinion, wrote:

> This principle has also been clearly announced in decisions of the district courts upon facts similar to those in the instant case, holding that the sole issue as to the scope of the remedy provided by the Jones Act, as narrowed by the Compensation Act, is whether or not the plaintiff or libelant was at the time of his injury a member of the crew, and not whether he was doing seamen's work or was in fact a seaman, that the character of the work being performed is not a controlling factor, and that longshoremen who load and unload a vessel under temporary local employment do not become members of the crew. Kraft v. A. H. Bull S.S. Co., Inc. (D.C.N.Y), 28 F. Supp. 437; Mamat v. United Fruit Co. (D.C.N.Y.) 39 F. Supp. 103; Rackus v. Moore-McCormack Lines, Inc. (D.C. Pa.), 85 F.Supp. 185; Skow v. Gypsum Carrier (N.D.Cal.), 164 F.Supp. 879; Sullivan v. American President Lines Ltd. (N.D.Cal.), 206 F.Supp. 547.

Circuit's post-*Offshore* opinion in *Rotolo v. Halliburton Co.*[41] is pertinent. There the court quoted *Offshore* as follows, in part:

> [I]n spite of the Gianfala to Grimes—Butler series of cases . . . a court, trial or appellate, may in the proper case hold that there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman and member of a crew of a vessel under the Jones Act.

In the *Rotolo* case, the Fifth Circuit sustained the trial court's grant of a directed verdict against appellant who had claimed he was a seaman under the Jones Act.[42] In *Thibodeaux v. McDermott & Co.*,[43] the Fifth Circuit, in another post-*Offshore* decision, affirmed a directed verdict in favor of the employer in Jones Act litigation. In the *Thibodeaux* case, the court said:

> Of course, there is nothing novel in the hope behind this claim. But in the final analysis what it is is the mistaken belief of so many that merely because the status of *who* is a seaman may be a question of fact, the principles summarized by us in Offshore Co. v. Robison . . . perforce make every case one of fact for jury decision. Neither that opinion nor the cases it discussed made any such declaration.[44]

---

[41]317 F.2d 9, 12 (5th Cir.), *cert. denied*, 375 U.S. 852, 11 L.Ed. 2d 79 (1963).

[42]Rotolo was a welder who was assigned to repair a crack in the hull of one of his employer's vessels. Rotolo's duties did not involve an assignment to one or more specified boats.

[43]276 F.2d 42, 46 (5th Cir. 1960).

[44]The court in *Thibodeaux* also stated:

> Here the decedent fails on many scores. He was a regular shore worker. He lived, ate and slept at home. He was not

In short, we hold that the superior court correctly ruled that appellant was not a seaman or a member of the crew of the Foss barge within the purview of the Jones Act. Our review of the record has led us to the conclusion that there is no reasonable evidentiary basis which would support a jury's finding that appellant was a seaman and a member of the crew of Foss Barge No. 185 at the time he was injured.

The *Butler, Grimes, Senko,* and *Gianfala* decisions are distinguishable in that the injured employees had performed, or were expected to perform, navigational functions in relation to the vessels (special purpose or otherwise) in question. Here appellant had not performed, and it was not anticipated that he would perform, any navigational function in regard to this unmanned barge owned by Foss Tug.[45] Appellant was a maritime worker whose only duties in connection with this barge were those of a longshoreman. Under the *Swanson* line of decisions we affirm the summary judgment which was entered by the superior court.

---

attached or assigned to any particular vessel either as a member of a crew or otherwise. His customary duties were in welding and cutting on vessels under construction, conversion or outfitting. His relation to the barge McDermott No. 5 was purely transitory—both in point of work to be done and the time of its duration. He was to weld to enable proper securing of cargo for the intended ocean voyage. None of the workers engaged in loading and securing the cargo either were to, or could, make the voyage on this unmanned barge.

. . .

Clearly what the decedent was doing and had been doing for four days did not make him then a seaman. *Id.* at 46-47. See also Dixon v. Oosting, 238 F.Supp. 25 (E.D. Va. 1965).

[45]Even under the *Offshore* test, the record does not furnish an evidentiary basis for concluding that appellant was a seaman and a member of the crew.

Appendix B

In the Superior Court for the State of Alaska
Third Judicial District

65-301 A

HARRY T. BOWERS,
Plaintiff,
vs.
KAISER STEEL CORPORATION,
Defendant.

AFFIDAVIT

State of California
County of Alameda—ss.

Roderick A. Chisholm, being first duly sworn on oath deposes and states: That he is employed by Kaiser Steel Corporation as Project Manager and was so employed during the month of November, 1964; that he makes this affidavit based on his personal knowledge and upon the documents and records of Kaiser Steel Corporation in his possession or control.

The Middle Ground Shoal drilling platform was fabricated by Kaiser Steel Corporation (hereinafter Kaiser) at Richmond, California, and consisted of the steel platform proper, associated steel structures and leg sections. On completion of fabrication the leg

sections were made temporarily watertight and secured to the platform in a horizontal attitude, in order to furnish flotation to the platform which was not itself capable of flotation, to permit towage of the platform from California to Cook Inlet, Alaska. The Platform itself is not and never has been capable of floating.

During the process of assembly and erection of the platform, on or about August 16, 1964, the legs were upended and secured permanently to the floor of Cook Inlet, and compartments thereof were flooded. Said legs are not now watertight and, since on or about August 16, 1964, could not be made watertight. The platform is secured to the leg sections at a height of approximately 50 feet above the surface of the waters at Cook Inlet at high tide. As it existed from and after about August 16, 1964, on February 15, 1965, and at all times since the platform or work surface was not floating on, submerged in, or in direct contact with the water and was supported by the leg sections permanently secured to the ocean floor of Cook Inlet.

The platform was not designed or intended for use in the transportation of persons or property from place to place, has not been used for that purpose and is not capable of being used for that purpose.

Affiant further states that according to the records of Kaiser Steel Corporation plaintiff Harry Bowers was injured on November 4, 1964 aboard the Foss Barge No. 185. This barge was owned by Foss Launch & Tug Company and was utilized for the transportation of construction materials to the Drilling Plat-

form, which Kaiser was under contract with Shell Oil Company to construct. The Foss Barge No. 185 was not self-propelled and had no crew. It was towed to and from the location of the Drilling Platform at the job site by a tug boat owned and operated by Foss Launch & Tug Company, pursuant to a towing contract between Foss Launch & Tug Company and Kaiser Steel Corporation by which Foss furnished the services of a fully-manned tug, as required by Kaiser, for an agreed consideration. All navigation of the barge was accomplished by the Foss tug and its crew; Kaiser did not employ and did not pay compensation to, the crew members of the Foss tug who at all times remained employees of Foss Launch & Tug Company as an independent towing contractor.

/s/ Roderick A. Chisholm.
Roderick A. Chisholm.

Subscribed and sworn to before me this 14th day of September, 1965.

(Seal)

Orphia J. Badgley
Notary Public in and for the State of California, residing at Oakland.
My Commission expires: Apr. 2, 1968.

LIBRARY
SUPREME COURT, U. S.

MAY 24 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1297

HARRY T. BOWERS,
Petitioner,

v.

KAISER STEEL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE V. POWELL,
1700 Washington Bldg.
Seattle, Washington 98101
Attorney for Respondent

GORDON W. MOSS,
LANE, POWELL, MOSS & MILLER
A. D. TALBOT,
Of Counsel

METROPOLITAN PRESS — SEATTLE, WASH.

SUBJECT INDEX

	Page
Questions Presented	1
Statement Of The Case	1
Argument	4
A. The Middle Ground Shoals Drilling Platform Was Not a Vessel	4
1. Petitioner's claim that the platform was a vessel and he a member of its crew was not properly raised below	4
2. As a matter of law the drilling platform was not a vessel	6
B. The Alaska Supreme Court Did Not Decide This Case Contrary to the Applicable Decisions of This Court Which Do Not Make This a Jury Case	9
Conclusion	17

TABLE OF AUTHORITIES

Table of Cases

Aycock v. Lykes Bros. SS Co., 236 F. Supp. 360 (D. Ct. Tex., 1964) 16

Butler v. Whiteman, 356 U.S. 271, 2 L.Ed.2d 754 (1958) 14, 15

Dixon v. Oosting, 238 F. Supp. 25 (D. Ct. Va., 1965) 7

Duignan v. United States, 274 U.S. 195, 71 L.Ed 999 6

Garland v. Alaska SS Co., 217 F. Supp. 757 (D. Ct. Alaska, 1963) 16

Gianfala v. Texas Co., 350 U.S. 879, 100 L.Ed. 775 (1955), 222 F.2d 382 ..... 6, 10, 11, 15

Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 2 L.Ed.2d 737 (1958) 4, 12

Page

Hartford Life Ins. Co. v. Johnson, 249 U.S. 490, 63 L.Ed. 722 (1919) 6

Hill v. Diamond, 311 F.2d 789 (4 Cir., 1962) 7

Johnson v. Noble Drilling Co., 264 F. Supp. 104 (D. Ct. La., 1966) 7

Kyles v. James W. Elwell & Co., 296 F.2d 703 (7 Cir. 1961), Cert. denied, 369 U.S. 852, 8 L.Ed.2d 10 (1962) 15, 16

McCullough v. Kammerer Corp., 323 U.S. 327, 89 L.Ed. 273 (1944) 6

Offshore Co. v. Robison, 266 F.2d 769 (5 Cir., 1959) 4, 8-9, 15, 17

Petition of United States, 203 F. Supp. 215 (D. Ct. N.Y., 1962) 7-8

Ross v. Delta Drilling Company, 213 F. Supp. 270 (D. Ct. La., 1962) 14

Rotolo v. Halliburton Co., 317 F.2d 9 (5 Cir. 1963), Cert. denied, 375 U.S. 852, 11 L.Ed.2d 9 15

Senko v. LaCrosse Dredging Corporation, 352 U.S. 370, 1 L.Ed.2d 404 (1957) 11-12, 13, 18

South Chicago Coal and Dock Co. v. Bassett, 309 U.S. 521, 85 L.Ed. 732 (1940) 18

Swanson v. Marra Bros., 328 U.S. 1, 90 L.Ed. 1045 (1946) 9, 16

Texas Co. v. Savoie, 240 F.2d 674 (5 Cir., 1957), Cert. denied, 355 U.S. 840, 2 L.Ed.2d 51 7

Other Authorities

Rules of U.S. Supreme Court, Rule 19 18

IN THE

Supreme Court of the United States

October Term, 1966

No. 1297

HARRY T. BOWERS,
Petitioner,

v.

KAISER STEEL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

To the major question stated by petitioner should be added a subsidiary issue: Should this court grant certiorari to review a contention (that the "vessel" of which petitioner now claims to be a member of the crew was the drilling platform) advanced for the first time on petition for certiorari, and which was never made in either of the courts below, the Alaska Superior Court or Alaska Supreme Court?

STATEMENT OF THE CASE

The material and uncontroverted facts upon which the two courts below held there was no fact issue to submit

to a jury as to petitioner's status as a seaman, may be conveniently marshalled as follows:

1. Petitioner is an ironworker, not a seaman, by trade; he had been an ironworker for 20 years, had never been to sea as a seaman, had never held seaman's papers at any time, and was hired by respondent as an ironworker and was working as ironworker foreman when injured (Deposition of Petitioner, pp. 6-7, 25).

2. Petitioner did not eat, sleep, or travel on the barge on which he was injured, or on any tug or barge. At one time he lived in a camp on the fixed platform which was being constructed, but at the time of his injury he was living ashore in a rented house, and travelled back and forth between the drilling platform and his house by helicopter (Deposition of Petitioner, p. 8).

3. Petitioner was injured on a Foss Company barge, towed and controlled by a Foss tug whose crew members, and not petitioner, navigated the barge (Deposition, pp. 8-10). Respondent did not own or operate the barge (Foss Barge No. 185), which was owned by the Foss Launch & Tug Company whose tug towed the barge to and from the drilling platform carrying construction materials for the platform, pursuant to a towage contract between Foss and respondent. Respondent neither hired nor paid the crew members of the tug, who at all times were employees of Foss (Chisholm Affidavit, Appendix B to the Petition).

4. Petitioner was injured aboard the Foss barge while assisting in unloading of construction material from the barge to the platform. He was supervising other ironworkers engaged in such unloading activity, and per-

sonally was acting as signalman for the crane operator on the platform (Deposition pp. 13-14, 17).

5. During the entire period of his employment by respondent as ironworker foreman, petitioner's sole function aboard any barge brought to the platform was to load and unload cargo between the barge and drilling platform (Deposition, pp. 16-17).

6. Petitioner's relationship to any of the barges brought to the platform was sporadic, and he knows not whether he ever did work aboard Foss Barge No. 185 prior to his injury. He testified (Deposition pp. 15-16):

"Q. Can you tell us how many times you had been on board this particular barge before?

"A. I definitely don't.

"Q. Can you estimate it?

"A. I don't know whether I have ever been on that one before or not. I might have. They brought stuff aboard, brought the barges along side and we just went down and took the material we needed off. I never paid much attention to which one came along side, just whatever material we needed at the time."

7. In performing his work petitioner took no orders from the officers or crew of the Foss tug (except to stop work when the seas got too rough to hold the barge in position), but rather from respondent's general foreman on the platform construction job (Deposition, pp. 7, 19).

8. The Middle Ground Shoals drilling platform had been permanently secured to the floor of Cook Inlet on August 16, 1964, by non-watertight legs which supported the platform and were permanently secured to the ocean floor. (This occurred prior to the time petitioner went

to work for respondent, Deposition p. 7). After fabrication of the drilling platform in California the legs were made temporarily watertight in order to furnish flotation to the platform (which is not and never has been capable of floating) to enable it to be towed to Alaska; but after installation of the legs and platform in Cook Inlet the platform was and is a permanent structure, and one that was not designed or intended for use in the transportation of persons and property, has not been used for that purpose and is not capable of being used for that purpose (Chisholm Affidavit, Appendix B to Petition).

ARGUMENT

A. The Middle Ground Shoals Drilling Platform Was Not a Vessel

1. *Petitioner's claim that the platform was a vessel and he a member of its crew was not properly raised below.*

Petitioner apparently contends that the drilling platform was a "special purpose" vessel or structure and because he concededly had a permanent relationship to this structure he, therefore, presented an evidentiary basis for a jury finding that he was a Jones Act seaman. Thus, he claims (Petition, p. 6) the Alaska Supreme Court unduly limited the scope of its review to whether petitioner could be found to be a member of the crew of the Foss barge; and he asserts that the drilling platform is not distinguishable from the drilling barge involved in *Offshore Co. v. Robison*, 266 F.2d 769 (5 Cir., 1959) and the Texas tower in *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 2 L.Ed.2d 737 (1958).

Not until now has petitioner advanced this theory, that the drilling platform could be found to be a vessel and he

a member of its "crew"; and the Alaska Supreme Court was correct in stating in footnote 14 of its opinion (Petition, Appendix A, p. v), that "Appellant does not contend that the drilling platform was a vessel." In his Complaint (R. 1) petitioner alleged that: "Plaintiff was a seaman at the time of his injury because he was on said barge which was held against the tower by two tugboats * * *." Although he now contends (Petition, p. 6 fn. 1) that it is not fairly inferable from this allegation that the barge was the only vessel on which he claimed to be a crew member, in the proceedings in the courts below he consistently took the position that he was a crew member of the barges on which he worked cargo and hence, of the Foss barge on which he was injured.

Thus: In his brief in opposition to the motion for summary judgment before the Superior Court, petitioner stated:

> "In effect, Kaiser Steel Company hired the plaintiff to unload each of the barges brought to the platform. *He was a crew member of each of the barges* * * *." (Emphasis added) (R. 58)

On page 6 of his Appellant's Brief on Appeal to the Alaska Supreme Court, petitioner likewise asserted that, "He was a crew member of each of the barges, hired specifically to do the job of unloading whichever barge had the correct steel components." In his Reply Brief before the Alaska Supreme Court, petitioner devoted two sections to the claims that he was permanently assigned to work on all the barges brought to the job site and that his longshoreman's work in handling cargo contributed to the mission of the barges. Not until this petition has petitioner asserted he was a member of the crew of the drilling plat-

form. Small wonder the Alaska Supreme Court concluded that petitioner "does not contend that the drilling platform was a vessel."

Petitioner's belated contention that the Middle Ground Shoals drilling platform was a special purpose vessel and he a member of its crew and hence a Jones Act seaman, was not properly raised, litigated or passed upon below. This court should not, and does not, grant certiorari to review such cases, *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328-9, 89 L.Ed. 273, 274 (1944); *Duignan v. United States*, 274 U.S. 195, 200, 71 L.Ed. 999, 1000. Further, the decision of the Alaska Supreme Court that petitioner did not there assert that the drilling platform was a vessel is binding upon this court, *Hartfort Life Ins. Co. v. Johnson*, 249 U.S. 490, 492-3, 63 L.Ed. 722, 724 (1919).

2. *As a matter of law the drilling platform was not a vessel.*

If consideration is given to petitioner's newly-conceived claim that the platform is a vessel, it is clear as a matter of law that it is not. And until he filed this petition, petitioner agreed that it was not; in his Appellant's Brief before the Alaska Supreme Court, p. 8, discussing *Gianfala v. Texas Co.*, 350 U.S. 879, 100 L.Ed. 775 (1955), petitioner stated: "The drilling platform was not a vessel by any stretch of the imagination." And yet he now contends that the Middle Ground Shoals platform was a vessel!

So far as we know, all courts considering the issue have uniformly held as a matter of law that non-navigable, non-floating, permanently-fixed structures such as this drilling platform are not vessels and construction work-

ers engaged in constructing them are not seamen by virtue of their employment on such structures. The latest decision is *Johnson v. Noble Drilling Co.*, 264 F. Supp. 104, 106 (D.Ct. La., 1966), where the court said:

> "The platform ST-11 was permanently affixed to the ocean floor. It was immovable and incapable of being floated or otherwise used or moved upon the surface of the Gulf. Such platforms cannot in any sense of the word be considered as vessels in navigation within the meaning of Jones Act or the general maritime law. *Ross v. Delta Drilling Co.*, E.D. La. 1962, 213 F. Supp. 270, *Sirmons v. Baxter Drilling Inc.*, W.D. La. 1965, 239 F. Supp. 348; *Dixon v. Oosting*, E.D. Va. 1965, 238 F. Supp. 25; *Hill v. Diamond*, E.D. Va. 1962, 203 F. Supp. 877, aff'd 4 Cir., 311 F.2d 789."

In that case the court held a member of the oil drilling crew injured aboard the platform not to be a member of the crew of a tender—a special purpose vessel—used to support the drilling activities on the platform.

Texas Co. v. Savoie, 240 F.2d 674 (5 Cir., 1957), held a permanently fixed well platform—similar to the one at bar—was not a vessel as a matter of law. *Hill v. Diamond*, 311 F.2d 789 (4 Cir., 1962), held a floating tube or section of a vehicular tunnel was not a vessel and workmen on such floating tunnel section were not seamen as a matter of law. *Dixon v. Oosting*, 238 F. Supp. 25 (D. Ct. Va., 1965), held a capsetting rig resting on pilings was not a vessel and a piledriver operator working on the rig not a seaman—likewise as a matter of law. *Petition of United States*, 203 F. Supp. 215 (D. Ct. N.Y., 1962), held that a Texas Tower permanently affixed to the bottom of the sea on legs, similarly to the drilling platform involved in the case at bar, was not a vessel for

the purposes of application of the Limitation of Liability Act, and this despite the fact that the platform itself was capable of floating and had been floated to the installation site. The court stated at 203 F. Supp. 219:

> "The fact that the Tower was floated to its position does not make it a 'vessel' * * *. The fixed nature of this Tower is incongruous to the concept of mobility. Merely because a component of the Tower had or has the potential ability to float does not constitute the Tower a 'vessel.'"

(Compare this with Petitioner's Argument on page 10 of the Petition, fn. 2.)

Nor are the foregoing authorities contrary to *Offshore v. Robison*, 266 F.2d 769 (5 Cir., 1959), on which petitioner places chief reliance (Petition, p. 10). On page 9 of the petition, petitioner incorrectly describes the "vessel" in *Robison* as "a non-motive drilling platform, similar to the platform in the instant case," and on page 10 inconsistently asserts that the fact that the *Robison* "platform" was moved from time to time to different locations is not a distinction of controlling significance. But this distinction is vital and was so regarded by the Circuit Court in *Robison*. There, the worker was injured on a submersible drilling barge or mobile drilling platform, designated "Offshore No. 55," which was moved about from well to well as occasion demanded. The Circuit Court in *Robison* distinguished that case from *Texas* [illegible] 240 F.2d 674, Cert. denied, 355 U.S. 840, [illegible] (involving a permanent oilwell platform) [illegible] by stating at 266 F.2d 779:

> "The [illegible] case is not this case. There was no showing that Savoie performed any duties on the [illegible] he was a passenger on a water-taxi. *His duties*

> *related entirely to work on permanently fixed well platforms.* Robison was attached permanently to Offshore No. 55. *Offshore No. 55 is not a man-made island.* Like the submersible barge in Gianfala, Offshore No. 55 was a special purpose vessel, a floating drilling platform. * * * Some of Robison's duties had a 'significant navigational function,' like Senko's in that they related to the seaworthiness, maintenance (welfare) of Offshore No. 55. Some of his duties—to which a jury might have attached importance—though minor are traditionally the duties of seamen *in that they related to the movement of the vessel as a means of transport on water." (Emphasis* added)

As a matter of law, petitioner could not be a Jones Act seaman because he worked on the permanently-fixed Middle Ground Shoal drilling platform. If he could be found a seaman at all it is solely because of his longshoreman's work aboard the Foss barge; and unless *Swanson v. Marra Bros.*, 328 U.S. 1, 90 L.Ed. 1045 (1946) is to be now overruled, an employee whose sole connection with a vessel not owned or operated by his employer is to load or unload cargo from it does not present an evidentiary basis to carry his claim to a jury, that he is a seaman entitled to sue his employer under the Jones Act rather than be restricted to his rights under the Longshoremen's Act.

B. The Alaska Supreme Court Did Not Decide This Case Contrary to the Applicable Decisions of This Court Which Do Not Make This a Jury Case

As he did in the court below, petitioner relies almost exclusively on the four cases decided by this court between 1955 and 1958, discussed *infra*, which concededly went a long way in liberalizing the concept of what constitutes a sufficient evidentiary basis to take to a jury a claim that a worker injured on navigable waters is a

Jones Act seaman or member of the crew of a vessel. However, all of these cases differ from the case at bar in two vital particulars, each of which is fatal to petitioner's claim:

(1) In every case there was evidence that the employee performed, had performed or was expected to perform some significant navigational function pertaining to the vessel; and

(2) In every case the employer, so far as may be inferred, owned or operated the vessel of whose crew plaintiff claimed to be a member. In no case has this Court held that a jury question is presented where the employee's sole function aboard the vessel was to load or unload cargo—the traditional job of the longshoreman.

It was the unique factual situation in each of the cases decided by this Court which prompted its decision to hold the issue of the workman's status to be a jury question. In *Gianfala v. Texas Co.*, 350 U.S. 879, 100 L.Ed. 775 (1955), the operative facts appear from the Circuit Court's opinion in 222 F.2d 382, 384 (fn. 2). The workman was killed while working on a submersible drilling barge called the "Shea" which was submerged at the time of the accident. It was without doubt a "special purpose vessel"; it was undeniably a vessel since it was periodically moved from one location to another. When this was done the decedent's duty was to float the barge by pumping it out so as to permit it to be moved, and then to sink it again when it reached its new location. This had occurred at least 10 to 12 times while the decedent had been employed aboard the barge and he accordingly had a "significant navigational function" to perform

aboard this vessel, and his regular work contributed to the mission of this special purpose vessel. Unlike the workman in *Gianfala,* petitioner had no more or less permanent connection with the Foss barge and performed *no* navigational function whatever aboard that barge, significant or otherwise.

Senko v. LaCrosse Dredging Corporation, 352 U.S. 370, 1 L.Ed.2d 404 (1957), undoubtedly contains the most illuminating discussion of this Court's views of what constitutes an evidentiary basis to submit to a jury the issue of an employee's claim to the status of a seaman. In *Senko,* the plaintiff was a maintenance man about a dredge—concededly a vessel—whose work included the carrying and storing of supplies and general maintenance of the dredge, and he was injured by the explosion of a coal stove while placing signal lanterns from the dredge in a shed ashore. The Illinois Appellate Court characterized the plaintiff as an employee whose principal duty was to load supplies on a vessel at anchor and perform incidental tasks of a common labor character; in reversing, this court did not hold that the loading of cargo on or off a vessel constituted the workman a member of the crew—which is the issue in this case—but rather found a sufficient evidentiary basis in the record that the plaintiff had a *significant navigational function* to perform aboard the dredge so as to require submission of the issue of status to a jury. The precise basis of this Court's action *in Senko* and allied cases is illuminated by the following language from the opinion (1 L.Ed.2d 407):

> "Petitioner's witnesses testified that he was known as a 'deckhand' among rivermen. They said that he

was hired to clean and take care of the deck, splice rope, stow supplies, and, in general, to keep the dredge 'in shape.' This testimony indicated that *substantially all of petitioner's duties were performed on or for the dredge. A normal inference is that petitioner was responsible for its seaworthiness.* If the dredge leaked, for example, the jury could suppose that his job would be to repair the leak. Furthermore, a witness testified that *a usual duty of one holding petitioner's job was to take soundings and clean navigational lights when the dredge was in transit.* 7 Ill. App.2d, at 310, 129 N.E.2d, at 455, 456. Here again, the jury could reasonably have believed that petitioner would have these responsibilities in the event that this dredge were moved. Whether petitioner would be a member of the dredge's crew while taking soundings during a trip is certainly a jury question. If he were a member during travel, he would not necessarily lack that status during anchorage."

This court concluded at 1 L.Ed.2d 408:

"Because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was put in transit, we hold there was sufficient evidence in the record to support the finding that petitioner was a member of the dredge's crew." (Emphasis supplied)

The facts quoted above distinguish *Senko* from the case at bar. Petitioner was not "employed almost solely" on this Foss barge. He had no duty to maintain it. He did not have and was not expected to have any "significant navigational function" to perform aboard the barge.

The majority *per curiam* opinion in *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 2 L.Ed.2d 737 (1958), upon which petitioner places principal reliance, does not

disclose either the "evidentiary basis" of the jury question found to exist in that case, or which vessel that court had in mind, in concluding that Grimes could be found by a jury to be a seaman. It does appear from the dissenting opinion that immediately prior to his injury the Texas Tower had been towed to sea and Grimes lived on the Tower and kept it in condition by operating the machinery and pumps to expedite installation at the permanent site, as well as by performing certain functions to keep it in safe tow, during the voyage. He was injured while returning to the Tower some six days after permanent installation, from an unmanned barge where he had worked to prepare for transfer of construction materials to the Tower.

Grimes, too, is unlike the case at bar. When Grimes' Tower was towed to sea it was a floating, mobile vessel. Grimes was a crew member during the navigation of the Tower because he was aboard performing a significant navigational function—keeping the Tower seaworthy, operating the pumps and keeping this special purpose vessel in safe tow. That this is what this court had in mind is reasonably inferable from the citation of the *Senko* case, in support of the *per curiam* holding in *Grimes*. The *Grimes* case is further distinguishable in that there is no indication that the transportation barge on which Grimes had been working just before his injury was not owned by the employer. This is not true in the case at bar; how can respondent be said to be the employer of crew members working on the Foss barge when respondent neither owned nor operated the Foss barge or the Foss tug which navigated and towed it? It is a logical anomaly to impose the obligations of a shipowner upon an employer who

neither owns, charters nor operates the vessel of which the employee claims to be a member of the crew and seaman. Cf. *Ross v. Delta Drilling Company*, 213 F. Supp. 270 (D. Ct. La., 1962), where the drilling crew employee was injured on a support vessel owned and operated by a third party. In concluding that Ross was no seaman, the District Court gave considerable weight to the fact that the defendant-employer did not own or operate the vessel of which its employee claimed to be a crew member.

Butler v. Whiteman, 356 U.S. 271, 2 L.Ed.2d 754 (1958) involved the drowning of a day laborer who did odd jobs about his employer's wharf and had been cleaning the boiler of a tug preparatory to the tug returning to service just prior to his drowning. This court merely held in a *per curiam* opinion that a jury question was presented as to whether the tug was in navigation and whether or not the employee was a member of a tug's crew. Unlike respondent, Butler's employer owned and operated both the tug and barge there involved; and unlike petitioner, Butler's work was to ready the tug for navigation.

Undeniably the foregoing cases greatly liberalized traditional concepts of who may be a "seaman," but they nevertheless stopped far short of permitting a jury to infer that unloading cargo ever transforms a maritime worker such as petitioner into a Jones Act seaman. The referenced decisions of this Court have not been construed by the lower Federal courts as requiring every claim to a seaman's status to be submitted to a jury, nor have they viewed these decisions as obliterating the traditional right and function of the courts to hold, in a proper case, that

there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman and member of a crew of a vessel under the Jones Act. See, e.g., *Offshore Company v. Robison*, 266 F.2d 769 at 778; *Kyles v. James W. Elwell & Co.*, 296 F.2d 703, 704 (7 Cir. 1961), Cert. denied, 369 U.S. 852, 8 L.Ed.2d 10 (1962); *Rotolo v. Halliburton Co.*, 317 F.2d 9, 12 (5 Cir. 1963), Cert. denied, 375 U.S. 852, 11 L.Ed.2d 9. Though we are cautioned that this Court's denial of certiorari should nto be taken to mean that it approves the decision involved, nevertheless it can fairly be stated that this court has had ample opportunity to correct the understanding of the lower courts if this court meant to hold in the *Gianfala* to *Butler* cases that every claim by a maritime worker to a seaman's status perforce presents a fact question. It has not done so because, we suggest, this Court meant to announce no such rule of law.

The case at bar presents the naked question of whether, within the framework of maritime law, a maritime worker whose sole connection with a vessel not owned or operated by his employer is to load or unload cargo from that vessel, can be found to be a seaman and member of the crew of such vessel. The facts are clear and undisputed in this case, and not susceptible of drawing of conflicting inferences. If petitioner's activities in longshoring cargo between the barge and the drilling platform are sufficient to constitute an "evidentiary basis" to support a jury finding that he was a member of the crew of the Foss barge, then he ought to be held a seaman as a matter of law—rather than leave it to the vagaries of a jury's conception of who is a seaman. But it was the will of Congress when it enacted the Longshoremen's Act in

1927 that longshoremen (those who load and unload cargo from ships) and similar maritime workers have a certain compensation remedy, but none other, against their employers.

Obviously, then, a line must be drawn between crew members, on the one hand and longshoremen and other similar harborworkers on the other. This Court recognized and maintained the distinction when it decided *Swanson v. Marra Bros.*, 328 U.S. 1, 90 L.Ed. 1045 (1946), when it held that a longshoreman was precluded from suing his employer under the Jones Act for injuries sustained while engaged in loading cargo on a vessel. If respondent had hired longshoremen from the Longshoremen's Union hiring hall in Anchorage to unload the construction materials from the Foss barge to the drilling platform, and one of them had been injured as was petitioner and had sued respondent under the Jones Act, then the issue would be precisely the same as was decided in *Swanson, Kyles v. James W. Elwell & Co.*, 296 F.2d 703, 704 (7 Cir. 1961) Cert. denied, 369 U.S. 852, 8 L.Ed.2d 10 (1962), *Garland v. Alaska SS Co.*, 217 F. Supp. 757 (D. Ct. Alaska, 1963), *Aycock v. Lykes Bros. SS Co.*, 236 F. Supp. 360, 361 (D. Ct. Tex., 1964), and the other decisions discussed at length in the opinion below: All of these cases held as a matter of law that a longshoreman's sole remedy against his employer is that given him by the Longshoremen's Act—and we are aware of no judicial precedent to the contrary. Just because respondent chose to use construction workers, members of the Ironworkers Union, to perform this task of unloading construction materials from the barge to the drilling platform, can their legal rights be different? There is no reasonable basis in

law or logic for holding that an ironworker doing a longshoreman's work has a remedy the longshoreman does not have.

CONCLUSION

Petitioner belatedly attempts to associate his claimed seaman's status with the drilling platform by contending that it was a "special purpose" vessel on which he could be found to be a seaman. To support this remarkable contention petitioner mis-advises this court that in *Offshore Co. v. Robison*, 266 F.2d 769 (5 Cir. 1959) "the vessel was a non-motive drilling platform, similar to the platform in the instant case, firmly affixed to the bottom of the sea at the time of the injury" (Petition p. 9)—when the very essence of the *Robison* decision was that Offshore No. 55 was not a "man-made island" (which was the court's characterization of a permanently fixed drilling platform such as involved in the case at bar), but was a floating drilling platform carrying life rafts, holding regular abandon-ship drills and moving about from location to location. As a matter of law Middle Ground Shoals drilling platform was no vessel, and petitioner should not now be heard to contend that it was since he did not properly raise this claim in the courts below.

We cannot improve upon the conclusion of the Alaska Supreme Court in its opinion (Petition, Appendix A, p. xvi):

> "The *Butler*, *Grimes*, *Senko*, and *Gianfala* decisions are distinguishable in that the injured employees had performed, or were expected to perform, navigational functions in relation to the vessels (special purpose or otherwise) in question. Here appellant [petitioner] had not performed, and it was

not anticipated that he would perform, any navigational function in regard to this unmanned barge owned by Foss tug. Appellant was a maritime worker whose only duties in connection with this barge were those of a longshoreman. Under the *Swanson* line of decisions we affirm the summary judgment which was entered by the Superior Court."

In *Senko*, this Court stated that it "does not normally sit to reexamine a finding of the type that was made below," but did so because it believed that its decision in *South Chicago Coal and Dock Co. v. Bassett*, 309 U.S. 521, 85 L.Ed. 732 (1940) had not been fully understood. The Alaska Supreme Court did not misunderstand the prior decisions of this Court, and far from having decided the case at bar in a way probably not in accord with applicable decisions of this Court (Rule 19, U.S. Supreme Court Rules) it properly applied this Court's law on this Federal question. The petition for certiorari should be denied.

Respectfully submitted,

GEORGE V. POWELL,
Attorney for Respondent

GORDON W. MOSS,
LANE, POWELL, MOSS & MILLER
A. D. TALBOT,
Of Counsel